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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. [redacted] 7

JOHN JOSEPH KILLIAN,

vs.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONER'S REPLY TO GOVERNMENT'S BRIEF IN OPPOSITION.

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1. The Insufficiency of the Evidence of Petitioner's Communist Party Membership on December 11, 1952.

The government's recital of the evidence emphasizes that the case for the petitioner's Communist membership or affiliation on the single day, December 11, 1952, is bottomed upon an inference of continuing membership, drawn from evidence of membership before and after the sixteen months period surrounding that date. This case thus differs from *Hupman* v. *United States* (6 Cir., 1955), 219 F. 2d 243, which

involved "membership up to the critical date" and thereafter (219 F. 2d at page 248). As our petition sets forth, the inference of continuing membership over a sixteen months period denies the presumption of innocence and raises serious constitutional problems which should be resolved by this Court.

The few scraps of Ondrejka's testimony (admitted over objection) which the government cites do not bridge the sixteen months gap in the government's case. Ondrejka's conclusory testimony that he knew petitioner to be a Communist from 1951 through 1953 merely expresses the same improper inference of continuance in testimonial form. The conclusory testimony that petitioner discussed "Communist Party affairs" in the Fall of 1952 does not show Communist Party membership. It is as consistent with opposition to, or non-membership in the Communist Party as it is with membership or affiliation. The hearsay testimony of a statement by a third person that the Party was pleased with petitioner's work in the plant "during the past several months", was not adopted by the petitioner in any way (tr. 435). The hearsay declaration does not even support the inference that the Communist Party was "pleased" with petitioner's work because he was a Communist Party member. It is only by improperly mounting still another inference on that inference that petitioner's membership in the Communist Party on December 11, 1952 or any other particular date may be inferred. *United States* v. *Ross*, 92 U. S. 281.* Our petition seeks review of the question of whether or not the perjury rule of evidence is applicable in such a case (Question 1. b.), a question which is likewise presented for review in *Travis* v. *United States*, 363 U. S. 801. We believe that our argument (Pet., page 12), demonstrates from the very facts of this case that the practical

* The only evidence linking petitioner with the Communist Party after 1950 was Ondrejka's uncorroborated testimony.

considerations which have sustained the vitality of the rule in the face of scholastic criticism requires its application here.

2. The Insufficiency of the Evidence That the Alleged Misrepresentations Were Material or Within the Jurisdiction of An Agency of the United States.

The government's position that the allegedly false statements were material and within the jurisdiction of the National Labor Relations Board reemphasizes the conflict between the decision below and the rulings in *Jencks* v. *United States* (5 Cir., 1956), 226 F. 2d 540, *Rolland* v. *United States* (5 Cir., 1953), 200 F. 2d 678, and *Freidus* v. *United States* (D. C. Cir., 1955), 223 F. 2d 598. § 9(h) did not confer upon the Board the power to act as some kind of general loyalty clearance agency, taking loyalty oaths from union officers regardless of whether or not a proceeding is pending, and regardless of whether or not the union involved might come under the Board's jurisdiction. The jurisdiction of the Board is limited by the Act establishing it. And even when that jurisdiction is established, affidavits under § 9(h) are required and become material, only when an election petition is filed or a charge made of an unfair labor practice. The record here shows neither Board jurisdiction, nor materiality of the allegedly false statements.

The government's citation of *Kay* v. *United States*, 303 U. S. 1, 5-6, is not in point. The statute in that case did not require that the false statement be material.* In § 1001,

* The statute § 8 (a) of the Home Owners' Loan Act of 1933, 12 U. S. C. 1467 (a) (repealed June 25, 1948; see 18 U. S. C. § 1014) reads as follows:

> "Whoever makes any statement, knowing it to be false, or whoever willfully overvalues any security, for the purpose of influencing in any way the action of the Home Owners' Loan Corporation or the Board or an association upon any application, advance discount, purchase, or repurchase agreement, or

however, Congress deliberately limited the scope of criminality to material misstatements.

3. The Insufficiency of the Evidence That Petitioner Acted "Knowingly" or "Willfully."

The government does not attempt to rebut directly petitioner's argument that the mere fact of signing the affidavit is insufficient to prove that it was signed either knowingly or willfully, i.e. with the knowledge and intent that it would be filed with the Board to obtain the advantages of the Act. The government does not deny that there is a conflict between the decision below and the decision in *Jencks* v *United States* (5 Cir., 1955), 226 F. 2d 540. Instead of meeting these issues, the government endeavors to impart some flavor of conspiracy to the signing by describing it as taking place at the meeting of Local officers (opp. page 3). The record is clear that there was no "meeting" (tr. 118-119). The government's reference (opp. page 3, fn. 9) to the inscription on the face of the form, "See Instructions on the reverse side", likewise adds nothing to its case. The government's own witness testified that nome of the signers, including petitioner, read the reverse side (tr. 118).

The government's case boils down to the proposition asserted by the Court below. Actual knowledge and specific intent to cause the filing of a false affidavit are to be imputed to petitioner merely because he "was well educated" and "presumed" to have read the reverse side of the affidavit. The "presumption" established by the Court below, even if it were to be permissible certainly cannot withstand direct evidence that the petitioner did not read what he signed.

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loan under this Act, or any extension thereof by renewal deferment, or action or otherwise, or the acceptance release, or substitution of security therefor, shall be punished by a fine of not more than $5,000.00 or by imprisonment for not more than two years or both."

The statutory requirement that the assertedly false statement be made knowingly and willfully does not apply merely to poorly educated men. It applies to all, including petitioner.

Petitioner did not have to prove his innocence. He is not obligated, as the government suggests (opp. page 9), to put forward a reason why he signed the affidavit. (As a matter of fact the record shows why he signed it. He was told to by his union president (tr. 113-117).) The government had the burden of proving petitioner's guilt of the statutory criminal elements of scienter and intent. It failed to meet this requirement.

4. The Instructions on Membership and Affiliation.

The government attempts to mininize the trial court's erroneous and unconstitutionally vague instructions as to membership and affiliation by treating them as independent of each other (opp. page 12, fn. 6). We submit that the two instructions must be considered together. The trial court's instructions, combined with its refusal to instruct that a guilty verdict could not be returned on both counts, so confused the two statuses and so intermingled the criteria for determining them, that the error in each definition permeated the other.

The government concedes *sub silentio* that the trial court's definition of membership omits the performance of the objective acts required for membership, a requirement laid down by *Fisher* v. *United States* (9 Cir., 1956), 231 F. 2d 99, and the concurring members of the Court in *Jencks* v. *United States*, 353 U. S. 657. It likewise concedes through silence that the definition of "affiliation" as given by the trial court did not follow that laid down in *Bridges* v. *Wixon*, 326 U. S. 135, and *Bryson* v. *United States* (9 Cir.,

1956), 238 F. 2d 657 (although such an instruction was requested).

Whatever support the government may hope to gain from the trial court's direction that membership or affiliation must be found to have existed on December 11, 1952 and that the affidavit did not relate to past membership is vitiated by the "indicia" which the trial court gave the jury to determine membership. There was no limitation by the judge as to remoteness in time of these indicia. What the court gave with one hand it took back with the other. It defined guilt as membership or affiliation on December 11, 1952, but it permitted membership to be rested upon evidence relating to times long past.

The eleventh of the "indicia" of membership which the court gave to the jury was whether the petitioner

> "Has indicated by word, action, conduct, writing or in any way, a willingness to carry out in any manner and *to any degree* the plans, objectives and designs of the Communist Party," (emphasis supplied).

It defies comprehension how any person, including the jurors, could be expected on the basis of this instruction to distinguish between membership in the Communist Party and affiliation with it when affiliation is merely defined as a "close working alliance or association" with the Communist Party. These instructions permitted the jury to find petitioner to have been both a member of, and affiliated with the Communist Party on evidence which would at most show occasional and constitutionally protected support of some of its activities.

5. The Instructions on Intent and Scienter.

The unconstitutional vagueness of the instructions as to membership and affiliation is not redeemed by the instructions as to intent and scienter. In the first place, as we have pointed out in our petition the trial court defined the statutory requirement that the asserted misstatement be made "knowingly and willfully" as merely requiring a general imputed intent based on constructed knowledge rather than a true specific intent based on actual knowledge. In the second place, since neither membership nor affiliation was properly defined by the instructions, even if the jury had been properly instructed as to scienter, it still need not have found that petitioner was a member of or affiliated to the Communist Party as those terms must be defined under the constitutional limitations of § 9 (h) as laid down by this Court in *American Communications Association* v. *Douds*, 339 U. S. 382.

6. The Refusal to Give Cautionary Instructions as to the Testimony of Paid Informers.

This Court in *On Lee* v. *United States*, 343 U. S. 747, recognized that the use of paid informers is a "dirty business" and may raise "serious questions" of credibility. The Court held that a defendant is entitled to have this issue of credibility submitted to the jury with careful instructions. See also, *Fisher* v. *United States*, (9 Cir., 1956), 231 F. 2d 99, *Fletcher* v. *United States*, (D. C. Cir., 1946), 158 F. 2d 321, *Cratty* v. *United States*, (D. C. Cir., 1947), 163 F. 2d 844.

Although this Court and other courts have recognized the inherently greater potentiality of falsehood in paid informer's testimony, the instructions gave no hint of this to the jury. If anything, the instructions clothed the

informer witnesses in a mantle of patriotic respectability as persons who merely accepted "reimbursement for time or expenses." Where the court should have given the jury guidance, it refused so to do. We do not contend that the court was required to adopt petitioner's phrasing of the instruction. We do contend that the jury should have been informed of the possibility that a serious question of credibility might be raised by the testimony of a paid informer, and that the trial court erred in refusing so to do.

7. The Questions Under 18 U. S. C. § 3500.

(a) The government's defense of its refusal to produce the actual statements of its witnesses, which included receipts for payment (opposition pp. 12-13), highlights the conflict between the decision in the Court of Appeals below and the opinion of this Court in *Gordon* v. *United States*, 344 U. S. 414. No contention is made that these were not "statements" under § 3500 (e). The question is therefore squarely put of whether or not this Court in *Rosenberg* v. *United States*, 360 U. S. 367, overruled *Gordon* and held that a reviewing court can now "rationally say that the excluding of evidence unknown to the record was • • • harmless." (*Gordon* v. *United States*, 344 U. S. at p. 420.)

The government assumes in its argument that a schedule of the dates and amounts of payment would give all the information contained in the withheld statements. We have no factual basis to agree or disagree with this assumption. Neither did the reviewing court. The ardor with which the demand for them was resisted suggests that the actual documents might have been helpful to the defense.

(b) The government's refusal to produce all the statements of the witness relating to the policies, activities and program of the Communist Party, even for *in camera inspection* by the trial judge, is another example of what the

Court of Appeals for the Second Circuit has correctly criticized as a

> "* * * reluctance of the prosecutor and the trial court to accept the policy of yielding pre-trial statements of prosecution witnesses to the defense for purposes of cross examination, as originally defined in *Jencks* v. *United States*, 353 U. S. 657 and later settled in the statute, 18 U. S. C. § 3500." *United States* v. *Tomaiola*, (2 Cir., 1960) F. 2d, (No. 219, October Term 1959, decided July 14, 1960, not yet officially reported).

As we have set forth in the petition (pp. 19-22) since the issue of the nature and quality of Communist Party membership was highly relevant to the prosecution's case, the trial judge should at the very least have ordered these statements produced for his own inspection and to permit review of their producibility upon appeal, and should not have abdicated his responsibility of making the initial decision upon producibility to the prosecution.

The Court has already indicated by the grant of writs of certiorari in *Campbell* v. *United States*, 362 U. S. 909, and *Clancy* v. *United States*, 363 U. S. 836, to review questions arising from the administration of § 3500, that it considers such problems important. It is respectfully submitted that the problems raised here are of equal or greater importance to the administration of the criminal law and merit full argument before the Court.

8. The Unsworn Testimony of the Prosecutor.

The unsworn testimony of the prosecutor was neither obscure, as the government contends (opp. p. 13), nor incapable of influencing the jury. In the context of this case this unsworn testimony was highly prejudicial.

The character and credibility of Ondrejka, who was the government's key witness, had been seriously impeached by

his admission on cross examination that during his whole courtship of his wife, and during the marriage in which she bore him three children, Ondrejka had been regularly reporting her activities to the F. B. I. for pay. In a last effort to rehabilitate this witness the prosecutor made the following statement of fact!

> "He was married. The question was asked: 'You do not know what the answer is, and do not assume that you know.' We know. We talked about it out of your presence."

There is no obscurity here. In this passage the prosecutor told the jury to disregard Ondrejka's betrayal of his wife, because he, the prosecutor, knew facts from discussions with the trial judge and defense counsel which negated this evidence as proving Ondrejka's bad character. The only obscurity here lies in the prosecutor's failure to reveal what these alleged facts actually were. That obscurity, combined with the prosecutor's authority, made the statement even more prejudicial. If the prosecutor had laid a fact before the jury it could have evaluated that fact with the other testimony. Here the jury could not even do that. The insinuations and assertions of personal knowledge by the prosecutor were bound to carry great weight against the accused when they should have carried none. *Berger* v. *United States,* 295 U. S. 78, 88. In this case they prevented full analysis by the jury of the credibility of a witness upon whose testimony the whole case of the prosecution rested.*

At the time the prosecutor's statement was made the defense objected and the trial judge overruled the objection (tr. 666). The jury could only interpret this as judicial

* The prosecutor's statement was not merely a statement of the prosecutor's personal knowledge. It was an even more prejudicial statement that the defendant's attorney had admitted privately that his arguments were invalid. Of course, no such statement was ever made by defense counsel.

approval of the prosecutor's unsworn testimony. The subsequent general instruction that arguments and statements of counsel were not evidence could not have removed this interpretation, *United States* v. *Toscano* (2 Cir., 1948), 166 F. 2d 524, 527.

CONCLUSION.

For the reasons set forth in the petition and in this reply, the petition herein should be granted.

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